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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matters of	)	
	)	
Guam Public Utilities Commission	)	
	)	
Petition for a Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act	)	CCB Pol. 96-18
	)	
	)	
Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers Under Section 251(h)(2) of the Communications Act	)	CC Docket No. 97-134

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF IT&E OVERSEAS, INC.

I. INTRODUCTION

IT&E Overseas, Inc. ("IT&E"), by its attorneys, respectfully submits these Comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on May 19, 1997. In its NPRM, the Commission tentatively concluded that, under Section 251(h)(2) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 251(h)(2), the Guam Telephone Authority ("GTA") should be treated as an incumbent local exchange carrier ("LEC") for purposes of Section 251 of the Act, 47 U.S.C. § 251. See Guam Public Utilities Commission, FCC 97-171, ¶24 (released May 19,

1997) ("Guam PUC").[1] In addition, the Commission solicited comments regarding whether other similarly situated LECs also should be treated as incumbent LECs under Section 251(h)(2) for purposes of Section 251 of the Act. Id. ¶ 43.

By its Comments, IT&E fully supports the Commission's tentative determination to treat GTA as an incumbent LEC under Section 251(h)(2) for purposes of Section 251. IT&E also requests the Commission similarly to treat the Micronesian Telecommunications Corporation ("MTC") as an incumbent LEC under either Section 251(h)(1) or Section 251(h)(2). In addition, IT&E urges the Commission to declare that MTC is immediately subject to the interconnection and resale obligations of Section 251(c) upon receipt of IT&E's bona fide request for interconnection.

II. THE FCC SHOULD TREAT GTA AS AN INCUMBENT LEC UNDER SECTION 251(H)(2)

In its Reply Comments submitted in the above-captioned proceeding in response to the Guam PUC's petition for declaratory ruling, IT&E urged the Commission to exercise its authority under Section 251(h)(2) of the Act to declare by rule that GTA is an incumbent LEC subject to the resale and

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[1] Concurrently with the issuance of the NPRM, the Commission also issued a declaratory ruling concluding that GTA is not an incumbent LEC within the meaning of Section 251(h)(1) of the Act, 47 U.S.C. § 251(h)(1), because GTA was not a member of the National Exchange Carrier Association, Inc. ("NECA") as of February 8, 1996, and subsequently has not become a "successor or assign" of a NECA member, although it has since become a NECA member. See Guam PUC, ¶ 20; Guam Telephone Authority Petition for Declaratory Ruling to Participate in the National Exchange Carrier Association, Inc., CCB/CPD File No. 96-29 (Com. Car. Bur., released May 12, 1997). In addition, the Commission determined that GTA qualifies as a rural telephone company under Section 3(37)(c) because GTA serves fewer than 100,000 access lines in its study area. Id. ¶ 21. However, in light of GTA's receipt of bona fide requests for interconnection, GTA has filed a stipulated with the Guam PUC declaring that "GTA shall not request a determination, pursuant to Section 251(F)(1)(A) of the Act, that bonafide requests for interconnection, resale services, and/or unbundled network elements are unduly economically burdensome or technically infeasible nor shall GTA in any way seek to forestall or inhibit the development of competition on Guam." Stipulation of GTA and Georgetown Consulting Group, Inc., Docket 96-006 (Guam PUC).

interconnection obligations of Section 251(c). See Reply Comments of IT&E, at 5 (filed Sept. 19, 1996). Section 251(h)(2), 47 U.S.C. § 251(h)(2), specifically authorizes the Commission to treat a LEC as an incumbent LEC if the following conditions are satisfied: (1) the LEC "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [an incumbent LEC as defined in Section 251(h)(1)]; (2) the LEC "has substantially replaced an incumbent [LEC as defined in Section 251(h)(1); and (3) "such treatment is consistent with the public interest, convenience, and necessity and the purposes of [Section 251]." IT&E fully supports the Commission's tentative conclusion that the conditions under Section 251(h)(2) have been satisfied with respect to GTA.

As the Commission noted in its NPRM, "[i]ncumbent LECs typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c)." Guam PUC, ¶ 26. Because GTA wields the same monopoly power held by statutorily defined incumbent LECs, GTA should be subject to the same regulatory safeguards. Since 1973, GTA has been the sole provider of local exchange and exchange access services on Guam. GTA currently is one of the thirty largest LECs in the United States and provides service to almost 80,000 access lines in Guam. Moreover, as IT&E noted in its Reply Comments, since GTA is a government-owned corporation that is not-for-profit and tax-exempt, it enjoys a greater degree of financial security than statutorily defined incumbent LECs. Reply Comments of IT&E, at 6. Thus, as IT&E further noted in its Reply Comments, because GTA's financial viability does not hinge on its ability to generate profits, GTA is largely insulated from the risks and vicissitudes of a competitive marketplace. Id.

Indeed, the Commission previously determined that, as a result of GTA's position as a monopoly provider of local exchange and exchange access services, GTA was able to deter

competitive entry into the interexchange service market by refusing to provide access services and by using a non-standard network interface. IT&E Overseas, Inc., 7 FCC Rcd 4023, 4026 (1992) ("Show Cause Order"). Specifically, the Commission found that GTA in fact had provided IT&E with inferior access service while requiring IT&E to pay excessive and unreasonable access charges. Id. Such market abuse is the very type of anticompetitive conduct that Congress intended to prohibit when it imposed on incumbent LECs the specific interconnection and resale obligations of Section 251(c) of the Act. See Joint Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 113 (1996) (expressing the Congressional intent "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

Notwithstanding the monopoly power held by GTA, a strict interpretation of Section 251(h)(2)(B) would appear to preclude the Commission from treating GTA as an incumbent LEC simply because GTA did not "replace" a statutorily defined incumbent LEC that was in existence as of February 8, 1996. Insistence on such a literal interpretation, however, would subvert the unambiguous intent of Congress to foster competition in all telecommunications markets by mandating the removal of barriers to entry into one of the last monopoly bottleneck strongholds in telecommunications – the local exchange and exchange access markets. As the Commission correctly noted in its NPRM, it is well established that if a literal interpretation of a statute would render an absurd or even an unreasonable result, the statute must be construed so as avoid such a result and in a manner consistent with the underlying legislative policy. See Guam PUC, ¶ 29 (citing, among other things, Holy Trinity Church v. United States, 143 U.S. 457, 459 (1898); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 454-55 (1989); United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1967)).

As a government-owned, tax-exempt carrier with sole control of the bottleneck local exchange

network in Guam, GTA exercises precisely the type of market power that Congress expressly intended to restrain through the imposition of Section 251(c) obligations.

The only difference between GTA and statutorily defined incumbent LECs is that GTA was neither a NECA member as of February 8, 1996 nor a successor or assign of a NECA member after February 8, 1996. However, had GTA been in full compliance with the Commission's Part 69 access charge rules, as the Commission envisioned when it issued the Show Cause Order in 1992, it would have been deemed to have been a NECA member as of February 8, 1996, and thus would have qualified as a statutorily defined incumbent LEC. Specifically, Section 69.601 of the FCC's rules, 47 C.F.R. § 69.601, provides that "[a]ll telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line tariff participants, or receive payments from the transitional support fund administered by the association shall be deemed to be members of the association." When the Commission established NECA in 1983, it required that all LECs providing access services participate in a single Carrier Common Line ("CCL") tariff and pooling arrangement administered by NECA and that such LECs be members of NECA. See MTS and WATS Market Structure, 93 FCC2d 241, 333-36 (1983). The Commission subsequently modified its single CCL tariff and pooling system to permit LECs to withdraw from the NECA tariff and pay long term support to those LECs continuing to participate in the NECA tariff. See MTS and WATS Market Structure, 2 FCC Rcd 2953 (1987). Thus, as a monopoly provider of local exchange and exchange access services subject to the FCC's Part 69 access charge rules, GTA was required either to participate in the distribution of the CCL revenue requirement through the NECA tariff or pay long term support to those LECs participating in such distribution. Consequently, had GTA been in full compliance with such requirement, it would have been deemed under Section 69.601 of the FCC's rules to have been a NECA member as of February 8, 1996, and thus qualified as an incumbent LEC under Section 251(h)(1) of the Act.

In fact, GTA has acknowledged that participation in NECA is one of the ways in which it is attempting to achieve full compliance with the Commission's access charge rules pursuant to the Show Cause Order. See Guam Telephone Authority, CCB/CPD File No. 96-29, ¶ 7 (released May 12, 1997). Since GTA was required to and could have participated in NECA well in advance of February 8, 1996, it would indeed exalt form over substance to permanently exempt GTA from the interconnection obligations of Section 251(c) simply because GTA failed to participate in NECA prior to February 8, 1996. Consequently, IT&E fully supports the Commission's proposal to interpret Section 251(h)(2)(B) to include any LEC that provides telephone exchange service to all or virtually all of the subscribers in its service area, where no NECA member served that area as of February 8, 1996. IT&E further supports the Commission's tentative conclusion that treating GTA as an incumbent LEC would be consistent with the public interest, convenience, and necessity and the purposes of Section 251 of the Act.

III. THE FCC SHOULD TREAT SIMILARLY SITUATED LECS SUCH AS MTC AS INCUMBENT LECS UNDER SECTION 251(H)(2)

IT&E urges the Commission to adopt a general rule that treats as incumbent LECs for purposes of Section 251 of the Act all LECs which do not qualify as statutorily defined incumbent LECs, but which exercise the same market power and control of bottleneck local exchange facilities as other statutorily defined incumbent LECs. In particular, the Commission should treat MTC as an incumbent LEC under Section 251(h)(2) of the Act, in the event that MTC is deemed not to qualify as an incumbent LEC under Section 251(h)(1) of the Act. The Commission also should take this opportunity to clarify that the termination of the Section 251(f)(1)(A) exemption from the incumbent LEC obligations of Section 251(c) for rural telephone companies is not dependent on a state commission determination pursuant to Section 251(f)(1)(A)(ii), where no relevant state commission with appropriate jurisdiction exists.

It is unclear whether MTC would qualify as an incumbent LEC under Section 251(h)(1), since it is unclear whether MTC could be deemed to have been a NECA member as of February 8, 1996. In the event, however, that MTC is deemed not to qualify as an incumbent LEC under Section 251(h)(1), MTC nonetheless should be treated as an incumbent LEC under Section 251(h)(2), since MTC is situated similarly to GTA and statutorily defined incumbent LECs. Specifically, MTC, a subsidiary of GTE Hawaiian Telephone Company, which in turn is a subsidiary of GTE Corporation, is the sole provider of local exchange and exchange access services in the Commonwealth of the Northern Mariana Islands ("CNMI") and provides service to approximately 16,000 access lines in the CNMI. See Reply Comments of GTE Service Corp. and its affiliates (collectively, "GTE"), Implementation of the Non-accounting Safeguards of Sections 271 and 272, CC Docket No. 96-149, at 17 (filed Sept. 13, 1996). MTC also is a dominant provider of interexchange services in the CNMI. See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, ¶ 173 (released Apr. 18, 1997) ("LEC Provision of Interexchange Services"). In addition, MTC owns and controls access to essential bottleneck facilities linking the CNMI to Guam and the rest of the world through its ownership of multi-purpose earth station facilities, microwave radio facilities, and fiberoptic submarine cable facilities.

As a result of MTC's monopoly power and control of essential bottleneck facilities, IT&E has endured a history of anticompetitive abuse by MTC since IT&E first began serving the CNMI. These anticompetitive practices include:

(1) denying IT&E cost-effective access to essential microwave radio facilities vis-a-vis satellite service between Guam and Saipan, and charging IT&E excessive and unreasonable rates for the use of such facility;

(2) denying IT&E fair access to essential earth station facilities;

(3) denying (until ordered by the FCC to cease and desist) IT&E both equal access or any other suitable form of trunk side access to the local exchange facilities, notwithstanding IT&E's repeated and long-standing requests for improved access;

(4) taking advantage of MTC's refusal to provide quality exchange access service to IT&E by highlighting IT&E's allegedly inferior access in MTC's media advertisements promoting its own interexchange service;

(5) discontinuing local exchange service to IT&E's Saipan long distance customers, allegedly because of disputes between MTC and the same customers over toll charges for calls made at other times over MTC's long distance network; and

(6) denying IT&E reasonable and prominent access to MTC's directory listing as a competing interexchange carrier.

Although the above-mentioned anticompetitive practices have been remedied through IT&E's own efforts, they evidence an established and recurring pattern of abuse of a dominant position by MTC in violation of the Act and the FCC's rules and policies. Moreover, in the absence of additional regulations and enforcement action to restrict such market abuse, MTC will continue to use its market power to impede competition in direct contravention of the pro-competition goals of the Telecommunications Act of 1996. Indeed, MTC already has attempted to abuse its bottleneck control of the only operational common carrier submarine cable between the CNMI with Guam by refusing to tariff its services over the submarine cable and to offer such services on a common carrier basis, as required under its Section 214 authorization. Such anticompetitive behavior by MTC in fact has prompted the CNMI to petition the Commission to initiate appropriate enforcement action and issue an order requiring MTC to provide services over its submarine cable on a common carrier basis in compliance with its Section 214 authorization. See Letter, dated June 24, 1997, from T.K. Crowe & E. Holowinski, Counsel for the CNMI, to W.F. Caton, Secretary, FCC.

Furthermore, because MTC provides local exchange, exchange access, and interexchange services on an integrated basis, it also has the ability and incentive to engage in anticompetitive conduct such as improperly misallocating costs from its interexchange services to its monopoly local exchange and exchange access services, discriminating against its interexchange competitors in the provision of local exchange and exchange access services, and initiating a price squeeze by raising the price of exchange access service charged to its interexchange competitors while maintaining low rates for its

interexchange services. Indeed, in an effort to minimize MTC's ability and incentive to engage in such anticompetitive conduct, the Commission recently has ordered MTC to comply with the separate affiliate requirements established in Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order, 98 FCC 2d 1191 (1984). See LEC Provision of Interexchange Services, ¶ 173. Consequently, because of MTC's sole control of bottleneck local exchange facilities and ability to impede competition, MTC must be treated as an incumbent LEC and subject to the interconnection and resale obligations of Section 251(c).

In the absence of an express Commission order requiring MTC immediately to comply with its obligations under Section 251(c), MTC will continue to abuse its monopoly power to prevent or delay local exchange competition. In fact, IT&E has reason to believe that MTC has been charging and continues to charge IT&E and other competing interexchange carriers excessive and unreasonably discriminatory rates for exchange access service in violation of Sections 201(b) and 202(a) of the Act. Specifically, IT&E has reason to believe that MTC is unlawfully discriminating against competing interexchange carriers by failing to impute the same access charges to its own interexchange operation or engaging in other anticompetitive conduct such as cross-subsidizing its interexchange operations with revenues from its monopoly local exchange and exchange access operations.

Despite IT&E's diligent attempts to raise its concerns regarding MTC's anticompetitive conduct with the Department of Justice ("DOJ"), the DOJ has yet to take definitive action to resolve the issue. In addition, on June 26, 1995, IT&E filed with the United States District Court for the District of Columbia ("D.C. District Court") a Memorandum in Opposition to GTE's Motion to Terminate the Decree, Civil No. 83-1298 (HHG), raising similar concerns regarding MTC's anticompetitive conduct. At the time, IT&E believed that the D.C. District Court was the appropriate forum to address concerns regarding MTC's anticompetitive conduct because the Commission had been inclined to defer rulings on such issues to the D.C. District Court, which had enforcement

authority over the GTE consent decree prior to enactment of the Telecommunications Act of 1996. Since the GTE consent decree has been replaced by the Telecommunications Act of 1996, it is now the Commission's responsibility to address concerns regarding MTC's anticompetitive conduct.

In an attempt to evade its interconnection and resale obligations under Section 251(c), MTC has claimed an exemption from such obligations as a rural telephone company under Section 251(f)(1) of the Act, even though IT&E has submitted a bona fide request for interconnection pursuant to Section 251(f)(1)(A). See Attachment 1 (Letter, dated June 18, 1997, from W.R. Santos, Director of Governmental Affairs, GTE Hawaiian Telephone Co., to J.M. Borlas, P.E., President, IT&E). Although Section 251(f)(1)(A) provides that the rural telephone company exemption will terminate upon a state commission determination that a bona fide request for interconnection is not unduly economically burdensome, technically infeasible, or inconsistent with statutory universal service requirements, such a prerequisite is inapplicable with respect to MTC, since there is no regulatory commission in the CNMI with authority to make the determination required under Section 251(f)(1)(A).

In the absence of such a state regulatory commission, MTC should not be permitted to enjoy a permanent exemption from its interconnection obligations under Section 251(c). Indeed, in its Order released in the proceeding entitled Implementation of the Local Competition Provision in the Telecommunications Act of 1996, CC Docket No. 96-98, at ¶ 1262 (released Aug. 8, 1996), the Commission emphasized that "Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service." Thus, the Commission concluded that "in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission's section 251 requirements, a LEC must offer evidence that application of those

requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry." Id. The Commission further declared that a rural telephone company seeking relief from the otherwise applicable requirements of Section 251(c) must bear the burden of proving that such relief is justified. Id. at ¶ 1263.

Since MTC has not made any attempt to show that compliance with its Section 251(c) obligations would be unduly burdensome, technically infeasible, or inconsistent with statutory universal service requirements, the Commission should seize this opportunity to declare that MTC, as an incumbent LEC, must immediately comply with its Section 251(c), notwithstanding the temporary exemption granted to rural telephone companies. The Commission also should clarify that clarify that the termination of the Section 251(f)(1)(A) exemption from the incumbent LEC obligations of Section 251(c) for rural telephone companies is not dependent on a state commission determination pursuant to Section 251(f)(1)(A)(ii), where no relevant state commission with appropriate jurisdiction exists.

IV. CONCLUSION

Based on the foregoing, IT&E urges the Commission to declare by rule that GTA is an incumbent LEC under Section 251(h)(2) of the Act. IT&E further requests the Commission to declare that MTC is an incumbent LEC under either Section 251(h)(1) or Section 251(h)(2) of the Act. Furthermore, IT&E urges the Commission to declare that the exemption for rural telephone companies under Section 251(f)(1) does not apply to incumbent LECs such as MTC, where (1) a bona fide request for interconnection has been received, (2) no effort has been made to show that satisfaction of such request would be unduly burdensome, technically infeasible, or inconsistent with statutory

universal service requirements, and (3) no relevant state commission exists to make the determination required under Section 251(f)(1)(A).

Respectfully submitted,

IT&E OVERSEAS, INC.

By: _____

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July 7, 1997

Its Attorneys

Attachment 1

GTE Hawaiian Tel

GTE Hawaiian Telephone Company Incorporated
P.O. Box 2200 · Honolulu, HI 96841 · (808) 546-3875

Beyond the call

William R Santos
Director-Governmental Affairs

June 18, 1997

Mr. John M. Borlas, P.E.
President
IT&E Overseas, Inc.
P.O. Box 24881
GMF, Guam 96921

Dear Mr. Borlas:

Hafa Dai! The following response is provided on behalf of The Micronesian Telecommunications Corp. (MTC), to your letter dated May 16, 1997, and received May 21, 1997, requesting the negotiation of a local interconnection agreement.

Under the Telecommunications Act of 1996, MTC qualifies as a "Rural Telephone Company" as defined under Section 3(a)(47). Accordingly, MTC's local exchange service areas within the CNMI (Saipan, Tinian and Rota) qualify under the Act's rural exemption provisions as provided by Section 251(f)(1) and is thus exempt from certain obligations and timelines for negotiating interconnection, resale and other items.

MTC, however, is willing to voluntarily negotiate some of its services that can readily be made available for resale, such as interexchange operator services. If you are interested in reselling MTC network services, please identify which services specifically and notify Del Jenkins, General Manager, MTC or myself for evaluation and consideration.

If you have any questions or would like to discuss this matter further please call me at (808) 546-3875.

Sincerely,

Bill Santos

cc: Del Jenkins

CERTIFICATE OF SERVICE

I, Elizabeth O. Dickerson, an employee of Akin, Gump, Strauss, Hauer & Feld, L.L.P., certify that copies of the foregoing **COMMENTS OF IT&E OVERSEAS, INC.** were sent by Hand Delivery or First Class U.S. Mail, postage prepaid, on this 7th day of July 1997, to the following parties:

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